NO. 80-1084

In the Supreme Court of the United States

OCTOBER TERM, 1980

MOUNTAIN STATES LEGAL FOUNDATION, *et. al.*,

Petitioners,

versus

DOUGLAS M. COSTLE, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et. al.*,

Respondents.

AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

NATIONAL CONFERENCE OF STATE LEGISLATURES
LANNY M. PROFFER
GEORGE WILLIAM SHERK
1125 17th Street, Suite 1500
Denver, Colorado 80202
(303) 623-6600

Attorneys for the Amicus

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Amicus Curiae the National Conference of State Legislatures respectfully submits the following views regarding *Mountain States Legal Foundation,* et al., v. *Costle,* et al., No. 80-1084.

INTEREST OF THE AMICUS

The National Conference of State Legislatures (NCSL) is the official representative of the country's 7500 state lawmakers and their staffs. It is a nonpartisan organization with three basic objectives: to improve the quality and effectiveness of state legislatures; to foster interstate communication and cooperation; and to assure state legislatures a strong, cohesive voice in the federal system.

It is the only national legislative organization governed and funded directly by the states.

NCSL has received written consent from Petitioner Mountain States Legal Foundation and Respondent Costle to file this brief as *amicus curiae*. The Attorney General of the State of Colorado representing the State of Colorado takes no position with respect to the filing of an *amicus curiae* brief. Copies of these letters have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

By denying the legislator petitioners standing to seek judicial review of the authority of the administrator of the Environmental Protection Agency, the Court of Appeals for the Tenth Circuit misapplied the precedents of this Court and other federal courts. The right of petitioner legislators to invoke the jurisdiction of the federal court to maintain the effectiveness of their votes and to assure the right of free and unfettered legislative debate seems well settled.

The Supreme Court must correct the Tenth Circuit departure from the established precedents in the law or risk far ranging adverse effects. The effective functioning of federalism requires a forum for the redress of grievances. State legislators should not be denied their day in court when their state is in the position of risking major funding losses.

Through the broad and aggressive exercise of its spending power, the national government exerts power and influence in the states far beyond the scope of its enumerated power. Unless there is the countervailing force of federal judicial review is available, our system of federalism cannot endure.

A holding by this Court that there is standing in the petitioner legislators would have beneficial effects far beyond the geographical and subject matter boundaries of this case.

ARGUMENT

I. STATE LEGISLATORS HAVE STANDING TO MAINTAIN THE EFFECTIVENESS OF THEIR VOTES

The judicial doctrine of standing is derived from Article III of the U.S. Constitution and is used to evaluate the relationship between the party asserting a claim and the legal issues raised. It serves as a constitutional limitation on federal court jurisdiction and a means of assuring that judicial authority and resources are not misused.

In its constitutional dimension, standing imports justiciability, that is, whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Article III of the federal constitution. As an aspect of justiciability, the standing question is whether the plaintiff has alleged such a personal stake in the outcome of the controversy to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf. *Warth* v. *Seldin,* 422 U.S. 490 (1975). See also *Harrington* v. *Bush,* 553 F 2d 190, 205 n. 68 (D.C. Cir. 1977).

This Court has made it clear that state legislators have standing in federal court to maintain the effectiveness of their votes. Dilution of voting power is "injury in fact." In *Coleman* v. *Miller,* 307 U.S. 433 (1939) Chief Justice Hughes writing for the majority declared, "Here, the plaintiffs include twenty senators whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. We think that these Senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes." 307 U.S. at 438.

In the instant case both the effectiveness and the integrity of the legislators' votes are at stake. The negative votes of the petitioners may have been sufficient to defeat the legislation, but many legislators were unable to vote their conscience or the wishes of their constituency. The legislators were instructed by the Administrator of the Environmental Protection Agency (EPA) as to what provisions the legislation should contain and when it had to be passed. Failure to comply would result in massive economic and administrative penalties. (Petitioners Brief, Pgs. 44a-47a). On this issue the legislature was reduced from a deliberative body to a ministerial agency whose sole function was to place the imprimatur of the state of Colorado on a federal executive agency policy.

II. INDIVIDUAL LEGISLATORS HAVE STANDING TO PROTECT THE LEGISLATURE FROM INSTITUTIONAL INJURY

By placing a deadline on approval of the legislation desired by the agency, the EPA did more than diminish the voting power of the legislators, it imposed its priority on the legislative agenda, limiting debate and ignoring other legitimate state and national priorities. The effectiveness of the votes of the individual legislators and integrity of the whole legislative process was imperiled.

The EPA timetable also had a detrimental effect on the legislature as an institution by "chilling" the exercise of First Amendment rights by individual legislators. The sanctions threatened by E.P.A. harmed both the legislature as an institution and the First Amendment rights of its members.

These are the precise requirements of standing established in *Kennedy* v. *Sampson,* 511 F2d 430 (D.C. Cir. 1974) and in *Harrington* v. *Bush,* 553 F2d 190 (D.C. Cir. 1977). In the latter case, the requirements for legislator standing to protect the legislative institution from harm

were established. A legislator is required to show that ". . .1) there has been injury-in-fact done to the Congress, and 2) that he, as an individual legislator, has been injured-in-fact because of the harm done to the institution." 553 F.2d at 199, n. 41. If these two requirements are met, a legislator has standing in the nature of a derivative right to sue to protect the institutional interests of the legislature.

III. INDIVIDUAL LEGISLATORS HAVE STANDING TO CHALLENGE ANY EXERCISE OF THE SPENDING POWER OF THE FEDERAL GOVERNMENT WHICH LIMITS FIRST AMENDMENT FREEDOM OF EXPRESSION

In *Flast* v. *Cohen,* 392 U.S. 83, 102 (1968) this Court ruled that there were specific constitutional limitations on the exercise by the federal government of the spending powers of Article I, Section 8 of the Constitution. In *Flast,* First Amendment guarantees regarding church/state separation were seen as such specific constitutional limitations. Also in *Flast,* this Court indicated that future cases would define other specific constitutional limitations on the spending power 392 U.S. at 105.

Any limitation imposed by a federal agency on the scope and content of state legislature debate and discussion destroys the effectiveness of a legislator's vote. There can be no effective vote by a legislator if his First Amendment right to freedom of expression is in any way restricted. Absent full and open debate and discussion, all of the issues and alternatives which a legislator must consider before casting his vote, cannot be properly evaluated.

Standing requirements to assert violations of First Amendment rights are substantially less restrictive than standing requirements to assert other claims. *Dombrowski* v. *Pfister,* 380 U.S. 479, 486-7 (1965). Even absent the less restrictive standing allowance of *Dombrowski,* the named legislators should have been allowed standing to challenge

the E.P.A.-imposed timetable because they suffered specific, direct, and individual injury to their First Amendment right of freedom of expression. *United States* v. *Richardson,* 418 U.S. 166, 177, 179-80 (1974); *Schlesinger* v. *Reservists Committee to Stop the War,* 418 U.S. 202, 217 (1974).

The First Amendment violations herein described provide the named legislators with proper standing to challenge the E.P.A.'s unwarranted and unconstitutional exercise of the spending power.

IV. THE INJURY SUFFERED BY THE LEGISLATORS WAS SEPARATE AND DISTINCT FROM ANY INJURY THAT MAY HAVE BEEN SUFFERED BY THE CITIZENRY AT LARGE

The injury suffered by the legislators is not one common to the citizenry at large. The plaintiffs *qua* legislators represented a small, narrowly defined group of 100 members with interests separate and distinct from the general citizenry. The action of the E.P.A. was directed specifically at the Colorado legislature. The legislature was directed to pass legislation containing specific provisions by a specified date. Thus, whatever injury may accrue to the residents of the state of Colorado or the affected areas thereof, the injury to the members of the legislature is distinguishable.

As members of a narrowly defined group asserting an injury peculiar to that group rather than one shared in substantially equal measure by all in a large class of citizens, the appellant legislators have established a clear right to invoke the jurisdiction of the federal courts *Gladstone Realtors* v. *Village of Bellwood,* 441 U.S. 91 (1979).

V. LEGISLATORS HAVE STANDING TO CHALLENGE FEDERAL AGENCY ACTION WHICH FORCES THEM TO CHOOSE BETWEEN VIOLATING THEIR OATH OF OFFICE AND RISKING SUBSTANTIAL LOSS OF FUNDS FOR THEIR STATE

The legislator appellants take an oath to support the Colorado and U.S. Constitutions. Colorado Constitution Article V, § 2(2). The Administrator of E.P.A. placed the legislators in the position of having to violate one or both of the constitutions which they were bound by oath to uphold. If they carried out the E.P.A. directive, they were in conflict with the Colorado constitution which places the legislative power of the state exclusively in the Colorado legislature. If they failed to carry out the directive, the state would lose substantial funding and would be subjected to other administrative penalties.

The position of the legislators is analogous to that of the members of the board of education in *Board of Education of Central School District No. 1* v. *Allen,* 392 U.S. 236 (1968). In that case members of the school board faced substantial loss of funds if they failed to comply with a state statute. They brought suit challenging the validity of the statute which required school districts to purchase and loan textbooks to students in private and parochial, as well as public schools. While standing of the board members was conceded in the Supreme Court, it had been challenged in the trial court and in the New York Court of Appeals. The Supreme Court left no doubt that the board members had standing to bring the suit.

"Appellants have taken an oath to support the United States Constitution. Believing [the statute] to be unconstitutional, they are in the position of having to choose between violating their oath and taking a step — refusal to comply with [the statute] — that would likely bring their

expulsion from office and also a reduction in state funds for their school districts. There can be no doubt that appellants thus, have "a personal stake in the outcome of this litigation." 392 U.S. at 241. See also *Trombetta* v. *State of Florida,* 353 F.Supp. 575 (1973).

VI. PETITIONERS MAY REPRESENT THE STATE OF COLORADO IN AN *EX RELATIONE* CAPACITY

At common law, an individual could seek a writ in *quo warranto* to challenge another individual's claim to a public benefit or privilege. The purpose of the writ in *quo warranto* was to require the individual claiming the benefit or privilege to show authority from the king for his claim. III Blackstone, *Commentaries* 262-64 (Cooley edition, 1884). The individual seeking the writ against one claiming a public benefit was the realtor who represented the interests of the Crown in an *ex relatione* capacity.

More recently, a relator has been defined as ". . . a party in interest who is permitted to institute a proceeding in the name of the People or the Attorney General when the right to sue resides solely in that official." *Brown* v. *Memorial National Home Foundation,* 329 P.2d 118, 133, *cert. denied* 358 U.S. 943 (1958). See also *Sarkeys* v. *Independent School District No. 40, Etc.,* 592 P.2d 529 (Ok. Sup. Ct. 1979).

At present, an interested party can bring suit in an *ex relatione* capacity in three situations. First, if the authority of the Attorney General to represent the state is not exclusive (*See,* for example, Colorado Rules of Civil Procedure, Rule 106 (a) (3) ". . . if the district attorney declines [to bring an action against one unlawfully holding an office or franchise], it may be brought upon the relation and complaint of any person."). Secondly, if the Attorney General, having exclusive authority, expressly consents to the *ex relatione* representation. *Kidwell ex. rel. Penfold* v. *Meikle,* 597

F2d 1273, 1287 (9th Cir., 1979). Thirdly, if the Attorney General, having exclusive authority, impliedly consents to the *ex relatione* representation. *Kidwell ex. rel. Penfold* v. *Meikle, supra.*

The Attorney General of the State of Colorado is authorized by statute to be ". . . the legal counsel and advisor of each department, division, board, bureau and agency of the state government *other than the legislative branch*" (emphasis added). C.R.S. 14-31-101(1)(a)(Supp. 1979).

The statute infers the legislature wanted to be free to retain its own counsel should it so desire. Furthermore, the Attorney General derives no additional authority from any other section of the Colorado Revised Statutes. *People ex. rel. Tooley* v. *District Court,* 549 P.2d 774 (1976), *Gillies* v. *Schmidt,* 556 P.2d 82 (1976).

The authority of the Attorney General does not include the authority to represent the interests of the legislature absent a specific request by the legislature. In this case, the named legislators sought to have their interests represented by the Mountain States Legal Foundation (Mountain States). The legislators were within their statutory rights in doing so.

Given this express statutory provision, both the named legislators and Mountain States had standing to represent the interests of the State of Colorado in an *ex relatione* capacity. The Tenth Circuit Court of Appeals, in reaching its conclusion that the Attorney General has the exclusive right to represent the State of Colorado, relied on the decision in *State Board of Pharmacy* v. *Hallett,* 296 P. 540 (Colo. 1937). The *Hallett* decision can be distinguished from the instant case because *Hallett* was decided *before* the Colorado legislature amended C.R.S. 24-31-101(1)(a) to allow the legislative branch to retain its own counsel. *Hallett* is not controlling since it was superceded by subsequent statutory amendment.

VII. THIS COURT SHOULD GRANT STANDING TO THE PETITIONERS SO THAT THE MERITS OF THE CASE CAN BE ADDRESSED

The recommendation given by this Court in 1947 in *Oklahoma* v. *U.S. Civil Service Commission,* 330 U.S. 127 (1947) that states adopt the "simple expedient" of not yielding to federal coercion rings hollow in 1981. Massive regulatory programs, of which the E.P.A. is only one, have been created under the guise of the spending power and states have become so dependent that they cannot risk the loss of the funds by challenging the constitutional validity of the regulations. The United States Office of Management and Budget figures show that federal grant in aid rose from $2.2 billion in 1950 to $49.8 billion in 1975, to $91.4 billion in 1980. The federal funds accounted 10.4% of state and local expenditures in 1950 rising to 26.3% in 1980. (Executive Office of the President, Special Analysis of the Budget H, January, 1981, pg. 252.) States can no longer afford to say no to the federal grant in aid funds despite onerous restrictions related and unrelated to the purpose or administration of the funds. The process has by increment emptied the meaning from the Tenth Amendment.

It is time for this Court to reexamine the reasoning in *U.S.* v. *Butler,* 297 U.S. 1 (1936) which granted expansive spending powers to the national government. Failure to place some parameters on the federal spending power will have the effect of erasing all restrictions imposed by the Constitution and will accelerate the erosion of powers lodged by the Constitution in the states or in the people. A favorable ruling on the merits of the case before this Court could begin the reversal of this dangerous trend.

CONCLUSION

The interests asserted by the legislators are grounded on the constitutional guarantees of the First and Tenth Amendments. They are therefore, clearly "within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150, 153 (1970).

The injury suffered by the legislators in this action arise solely and exclusively from the actions of the Administrator of E.P.A. It was under his direction that the legislature of Colorado was ordered to enact a specific statute and to do so by a time certain. The injury incurred is clearly such "that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court,:" *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 41-42 (1976).

A favorable decision of this court will permit the legislature of Colorado and the plaintiff members thereof to resume the exercise of their constitutional responsibilities. They will be free to review, repeal, amend or strengthen the legislation at issue. Affirmance of the Tenth Circuit ruling will result in a continuing injury to the legislators and the legislature of Colorado. Their voting power with respect to this issue has been lost since they have been denied the power to take any substantial legislative action without the consent of the Administrator of the Environmental Protection Agency. A finding of standing in the petitioners is an essential first step toward redressing the federal imbalance.

The *amicus* respectfully urges the Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully Submitted,

NATIONAL CONFERENCE OF STATE LEGISLATURES
LANNY M. PROFFER
GEORGE WILLIAM SHERK
1125 17th Street, Suite 500
Denver, Colorado 80205
(303) 623-6600

Attorneys for the Amicus